DUNLOP (M) INDUSTRIES BHD.

v.

PERNAS-SIME DARBY SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 94 OF 1983]
28 OCTOBER 1983

COMPANY LAW: *Transfer of shares - Exercise of right of pre-emption - Transfer to third party - Whether valid - Conditional contract - Issue of manufacturing licence - Effect of breach on agreement.*

In 1979, IT International Sdn. Bhd. (ITISB) was formed under a joint venture agreement (JVA) between the promoters, including the plaintiffs (DMIB), the 1st, 2nd and 3rd defendants (PSD, LTAT, KPDM) and the Kedah State Development Corporation (PKNK), and the Malaysian Rubber Development Corporation Berhad (MARDEC). The primary object of ITISB was the manufacture of tyres.

The manufacturing licence issued by the Ministry of Trade and Industry in 1978 under the Industrial Co-ordination Act 1975 was made subject to the condition, *inter alia*, ("condition (c)") that at least 79% of the shares of the company must be held by Malaysian citizens, including at least 65% to be reserved, and that the company must consult the Ministry before the allotment of the reserved shares.

In 1980, PSD *vis-a-vis* ITISB was substituted by the 6th defendants, by Pernas-Sime Darby Holdings Sdn. Bhd. (PSDH). Clauses 1.5 to 1.5.4 of the JVA provided for the transfer of shares in ITISB, that the transferor of shares should first offer to sell the shares to the other member or members ("the Non-Selling Party or Parties") of the company, the offer to include also the name and address of the prospective transferee, to whom the shares were to be transferred if the non-selling party did not accept the offer.

The transfer to the prospective transferee was to be made within a further 60 days following the expiration of the period provided for the election of the non-selling party. In September 1982, three of the shareholders ("the outgoing shareholders") offered their shares to DMIB, which accepted the offers within the 60 days given.

The shares were however transferred to PSDH, the prospective transferee named in the offers, as the Ministry did not approve of DMIB taking up the shares, as that would be in breach of condition (c).

The plaintiffs sued the defendants, claiming, *inter alia*, a declaration that the outgoing shareholders were bound by the agreements of sale to DMIB and a declaration that the transfers to PSDH were null and void. They obtained an interim injunction restraining the registration of the transfers to PSDH.

Held:

[1] The plaintiffs were not entitled to the declaration sought to invalidate the sale and transfer of the shares to PSDH. The outgoing shareholders were discharged from their obligations under the conditional contracts with the plaintiffs.

[2] The fact that the proposed change in the equity structure of ITISB would *per se* be in breach of condition (c) of the manufacturing licence did not make the conditional agreements between DMIB and the outgoing shareholders void.

[3] However, the acceptance by DMIB of the shares was null and void. At a meeting (23 December 1982) DMIB agreed that if a ruling against their right of pre-emption was given, their acceptance of the offers were to be considered null and void and the acceptance of PSDH to be operative.

[4] In any event, DMIB could not satisfy condition (c) which made the offers subject to the approval of the Ministry.

[5] There was no evidence of any improper activity on the part of the outgoing shareholders or any other party involved.

[6] The plaintiffs had failed to complete the sale within the time limits binding them, that is, within the time limits imposed by the JVA on the prospective transferee.

[7] The issue of the writ against the defendants did not suspend the operation of the conditional contract between the parties.

[8] Completion must be effected within a reasonable time, the computation of which depends on the context in which the question arises and which must be judged by an objective test that is applicable to both parties.

[9] In this case DMIB ought to have completed the sale at the latest within the time imposed by the JVA, limiting the time of the completion of the sale by the prospective transferee, PSDH.

Cases referred to:
Aberfoyle Plantations Ltd. v. Khaw Bian Cheng [1960] 26 MLJ 47
Re Longlands Farm, Long Common, Botley, Hants, Alford v. Superior Developments Ltd. [1968] 3 All ER 552
Johnson v. Agnew [1980] AC 367
K.T. Chandy v. Mansa Ram Zade [1974] AIR SC 642

For the plaintiffs - Humfrey Ball (Linda Gillian Olivero with him); M/s. Humfrey Ball
For the 1st & 6th defendants - C.V. Das (Yeo Puay Huei with him); M/s. Shook Lin & Bok
For the 2nd, 3rd & 4th defendants - Chan Hua Eng (Lim Kian Leong with him); M/s. Shearn Delamore & Co. and Drew & Napier
For the 5th defendant - K.K. Sng; M/s. Sng & Matthew

Legislation referred to:
Companies Act 1965, s. 179

JUDGMENT

VC George J:

Some time prior to 17 August 1978 the plaintiffs (DMIB) together with the 2nd (LTAT), 3rd (KPDM) and 1st (PSD) defendants and the Kedah State Development Corporation (PKNK) decided to promote the formation of a company to be known as IT International Sdn. Bhd. (ITISB), the primary object of which was the manufacture of tyres to which end and at the instance of the promoters an application dated 17 August 1978 for a manufacturing licence was made by the plaintiffs to the Ministry of Trade and Industry as required by the Industrial Co-ordination Act 1975.

The Ministry's letter of 20 October 1978 provided the approval of the application and the conditions on which the approval was given were set out in an appendix to the said letter of 20 October 1978, condition (c) whereof reads as follows:

(c) At least 79% of the shares of the company shall be subscribed and held by Malaysian citizens including at least 65% to be reserved and the company shall consult the Ministry of Trade and Industry before the allotment of the reserved shares.

The licence was No: A0007111 issued on 25 October 1978 by the Ministry under the Industrial Co-ordination Act 1975.

On 13 December 1979 the promoters and Malaysian Rubber Development Corporation Berhad (MARDEC) entered into a joint venture agreement (JVA) by which they agreed to form ITISB in the terms and on the conditions set out in the JVA.

The primary object of the joint venture is spelt out in the first of the two preambles to the JVA:

> WHEREAS the parties hereto have agreed to form a private limited company under the laws of Malaysia for the purpose of establishing a joint venture industry for the manufacture of motor cycle tyres, scooter tyres, crossply car tyres, crossply truck tyres, crossply light truck tyres, bicycle tyres and retreading and such other products as may be agreed from time to time by the parties here to in writing to be carried on as a joint venture by the parties hereto.

The object as has been seen was the establishment in Malaysia of a joint venture industry for the manufacture of various types of tyres.

Pursuant to the JVA, ITISB was duly incorporated on 20 December 1979.

On 23 April 1980 a resolution was passed by the Board of ITISB whereby PSD was substituted *vis-a-vis* ITISB by Pernas-Sime Darby Holdings Sdn. Bhd. (PSDH) who are the 6th defendants.

By an Extra-ordinary General Meeting of ITISB held on 5 August 1982 it was resolved unanimously to increase the share capital of the company from RM20,000,000 to RM28,000,000 by the creation of 8,000,000 additional ordinary shares of RM1 each. LTAT, KPDM, MARDEC and PKNK refused to take up their proportion of the right issue. DMIB refused to take up their proportion of the shares refused by those shareholders and there-upon PSDH took up their own entitlement as well as the entitlement of the refusing shareholders. In the event the equity structure of ITISB after the rights issue exercise was completed was:

DMIB	30.71
PSDH	26.94
LTAT	15.30
KPDM	7.65
MARDEC	14.29
PKNK	5.11
	100.00

The venture was entered into with enthusiasm (and no doubt with great expectation) by the parties concerned. Even before the formation of ITISB the plaintiffs proceeded to erect the factory for the manufacture of tyres. They contend that they did so at their own risk but the other defendants say that all the original promoters were at risk - nothing turns on that one way or the other.

Pursuant to a term of the JVA the plaintiffs entered into a management agreement with ITISB and also pursuant to the JVA the plaintiffs arranged for and Dunlop Ltd. of the United Kingdom entered into a "Technical Aid" agreement with ITISB. For all intents and purposes the business of ITISB was managed by the plaintiffs.

ITISB's business fell rather short of projections that had been made earlier which probably resulted in the need to increase the capital in August 1982 and which it would seem caused some disappointment and even disillusionment on the part of some of the partners to the venture. It could very well be that the refusal of some of the shareholders to take up their share of the rights issue reflected their disappointment. It turned out that not only were those shareholders not prepared to take up their share of the rights issue but in fact it would seem that they went on to decide to divest themselves of the shares that they held.

Now, *inter alia* Clauses 1.5 to 1.5.4 of the JVA provide for the transfer of shares in ITISB. The parties to the JVA had agreed that those provisions would obtain notwithstanding anything to the contrary in the Articles of Association of ITISB. In fact Article 27A of the Articles of Association of the company which sets out the procedures for the transfer of shares of the company, are in *pari materia* with the said Clauses 1.5 to 1.5.4.

The objective of those provisions [other than Clauses 1.5.4 and Article 27A (ii)(v)] was to ensure that while a member had the right to divest itself of its shares in the company, the remaining members could ensure that their proportion of equity ownership would not be watered down by such divestment. Clauses 1.5 to 1.5.1.3 have to be read:

1.5 ***Transfer of Shares***

Notwithstanding anything to the contrary contained in the Articles of Association of ITISB the parties hereto agree as follows:-

1.5.1 No party hereto may transfer any share in ITISB without offering such share to the other parties on the following terms and conditions:-

1.5.1.1 The party desiring to transfer (hereinafter called "the Transferor") any or all of its shares shall first offer in writing to sell such shares to the other member or members. The offer shall include a statement of its intention to transfer the name and address of the prospective transferee the number of shares involved and the price and other terms of the transfer;

1.5.1.2 The other party or parties (hereinafter called "The Non-Selling Party" or "Parties") may at its/their option elect by written notice to the Transferor within sixty (60) days after receipt of such offer to purchase all but not less than all of such shares and in such a case the Non-Selling Party or Parties shall have the right to purchase the shares of the Transferor upon the same terms and conditions as were offered by the prospective transferee PROVIDED THAT if there is more than one Non-Selling Member each such Member shall have the right to purchase only that proportion of the shares proposed to be transferred as the number of shares then owned by it shall bear to the total number of shares owned by all of the Non-Selling Parties (including the Non-Selling Party concerned) AND PROVIDED FURTHER THAT if one or more of the Non-Selling Parties does or do not purchase its or their proportionate share of such shares the remaining shares may be purchased *pro rata* by the other Non-Selling Parties but subject always to the first proviso;

1.5.1.3 If the offer to sell is not accepted by the Non-Selling Party/Parties the Transferor may transfer to the transferee named in the offer that number of shares specified in the offer on condition that the transferee agrees to and becomes bound by concluding an agreement with the Non-Selling Party/Parties

(other than the transferring party in the event of transfer of all its shares) whereby the prospective transferee undertakes to comply with all the terms and conditions hereof and so in effect becomes party hereto and that such transfer is made in strict accordance with the price and other terms stated in the said offer PROVIDED THAT if the Transferor shall fail to make such transfer within a further period of sixty (60) days following the expiration of the time-period hereinbefore provided for the election by The Non-Selling Party/ Parties the shares proposed to be transferred shall not be transferred without repeated compliance with the terms of this sub-clause.

What is envisaged is that there would be an understanding (which could be a contract) between the party desiring to transfer shares (transferor) and the party to whom the shares are to be transferred (transferee). The transferee could be another member of the company or an outsider. In order to adhere to the pre-emptive procedures full details of that understanding have to be given to the other members of the company and the shares intended to be transferred have to be offered to the said other members. The other members have 60 days after receipt of the offer to them "to elect to purchase all but not less than all such shares" offered and provided that election is made in writing, the member electing to do so, has the right to purchase the shares upon the same terms and conditions (of the understanding between the transferor and transferee). There are provisions for the situation that would obtain if more than one of the members had exercised their election.

If an election is made the vendor member and the electing party are expected to complete the sale upon the same terms and conditions of the said understanding.

Now in respect of transactions for the transfer of shares the usual freedom to contract is curtailed by the terms and conditions of the JVA. For instance as will be seen later herein, Clause 9.1 of the JVA has that effect. Similarly, the time for completion of the sale between the original parties (in the event none of the members exercise their rights of election) is limited by Clause 1.5.1.3. Completion of the sale must be effected within 60 days after the expiry of the 60 days allowed to the members for exercising their election. That is the inference to be drawn by the proviso to Clause 1.5.1.3.

When it became obvious that three of the shareholders (the outgoing shareholders) had made up their mind to divest themselves of their shares in the company, it became obvious that it fell upon DMIB and/or PSDH to pick up the shares. It would appear that it was felt that DMIB would not be interested, this feeling having no doubt come about by DMIB allowing PSDH to pick up the entire rights issue (of August 1982) shares of the other shareholders. That must have been why KPDM in offering their shares to PSDH included a provision for DMIB to waive their pre-emptive rights. At it turned out DMIB was after all interested in taking up the shares of the three shareholders and invoked the pre-emptive procedure laid down in the JVA and the Articles.

As a result the outgoing shareholders purported to adhere to the pre-emptive procedures and each of them wrote a letter of offer to DMIB and the offers contained in each of the letters were accepted by DMIB within the 60 days given to them to do so. The letters and acceptances are in Exhibit A pp. 116 to 127. As they are substantially similar, it is sufficient to read one of these letters and the relevant DMIB's letter of acceptance:

Bil.(60) dlm. KP/29/40 (3)
Tarikh: 23 September 1982
Dunlop Malaysian Industries Berhad
4 Jalan Tandang
P.O. Box 66
Petaling Jaya.

Dear Sirs,

IT International Sdn. Bhd.

We wish to inform you that the Koperasi Polis Diraja Malaysia Berhad which owns 2,142,000 shares of IT International wishes to sell these shares of Pernas-Sime Darby Holdings Sdn. Bhd. on the following terms:

(i) The consideration is RM1.05 per share payable in cash;

(ii) The offer is subject to approval being obtained from relevant Malaysian authorities;

(iii) Upon the transfer of ownership, the buyer will confirm in writing its undertaking to comply with all the terms and conditions of the IT International Sdn. Bhd. Joint Venture Agreement dated 13 December 1979;

(iv) The offer is valid for a period of 100 days beginning from today.

In accordance with the procedure set out in Clause 1 of the Joint Venture Agreement dated 13 December 1979 we hereby offer to sell to you such portion or all of our holdings of shares in IT International Sdn. Bhd. as you are entitled to under that Agreement on the same terms and conditions as are stated above.

In conformity with the requirements of Clause 1.5 of the Joint Venture Agreement we hereby state that:

(i) We intend, subject to the pre-emption procedure set out in that clause to transfer all of our holdings of 2,142,000 shares in IT International Sdn Bhd to Pernas-Sime Darby Holdings Sdn Bhd whose address is at 54 Jalan Ampang, Kuala Lumpur.

(ii) The price is to be at RM1.05 per share and the other terms of the transfer are as already stated above.

We would be grateful if you will let us know whether or not you wish to exercise the option to purchase these shares at an early date but in any case not later than 60 days from the date of this letter as provided in the Joint Venture Agreement.

Yours faithfully,
for Koperasi Polis Diraja
Malaysia Berhad

sd. Shamsuddin bin Mahyuddin
Group General Manager

c.c. Pernas-Sime Darby Holdings Sdn Bhd

"JCG/LS/8.1/F.834

Encik Shamsuddin bin Mahyuddin
Group General Manager
Koperasi Polis Diraja Malaysia Berhad
Peti Surat 768
1 Jalan Sulaiman
Kuala Lumpur.

18 November 1982

Dear Sir,

IT International Sdn Bhd

We refer to your letter (60) dlm. KP/29/40 (3) of 23 September 1982 in which you offered to sell to us such portion of your 2,142,000 shares in IT International Sdn Bhd. as we are entitled to under the Joint Venture Agreement dated 13 December 1979.

We accept your offer.

Yours faithfully
for Dunlop Malaysian Industries Berhad

M.J.H. Moffett
Managing Director

c.c. Fd-DMIB
B Rudd-DH
H Ball-KL
Hashim Harun-KL

When DMIB exercised their election to purchase the offered shares how much time did they have to complete the purchase? The offer letters do not specify the time within which completion is to take place. At first sight neither does the JVA. It follows on principle and on authority that completion must be effected within a reasonable time. *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] 26 MLJ 47,49. Computation of reasonable time depends on the context in which the question arises and must be judged by an objective test that is applicable to both parties. *Re Longlands Farm, Long Common, Botley, Hants, Alford v. Superior Developments Ltd.* [1968] 3 AER 552, 556.

It is to be noted that the pre-emptive procedures are laid out to the intent that the other members have right to purchase the shares if they so desire but if they do not so desire or in any event do not take up the shares, there should be a reasonable opportunity for the completion of the sale of the shares between the offerer member and the party to whom it was intended that the shares be transferred to (i.e. the completion of the sale between the parties to the original arrangement). Since by Clause 1.5.1.3 that sale has to be completed within the further 60 days it follows that completion of the sale by a member exercising the pre-emptive right must be effected within such a period of the second 60 days as will enable the vendor, in the event the pre-emption procedures come to naught, to give the original intended transferee reasonable notice that the shares are available for purchase and that the same can be completed, to enable the sale to be completed within that 60 days provided by 1.5.1.3.

Thus if such reasonable notice has to be, say 21 days, the DMIB had 39 days after the 60 days that they had to exercise their election, to complete the sale.

PSDH had up to or about the 23 & 28 January and 12 February 1983 respectively to complete the purchases in the event by the pre-emptive procedures the shares were not taken up. Once it was known that DMIB had accepted the offers one can understand the anxiety of all concerned to know whether in fact DMIB was going to complete or was entitled to complete the purchase.

Matters were brought to a head at the 19th ITISB Board meeting of 23 December 1982, the minutes of which are at p. 89 of Exhibit 'B'. Mr. M.J.H. Moffett on behalf of DMIB confirmed that there had been no change in the "status" of DMIB. Encik Halim Dahlan on behalf of PSDH then pointed out that DMIB taking up the shares would be in breach of condition (c) and "put ITISB in jeopardy" of losing its licence. Tan Sri Dr. Sekhar, the Chairman of the Board said that he had written to the Ministry seeking a clarification but had not at that time received a reply. It is relevant to reproduce the rest of the minutes of the meeting dealing with the purchase of the shares:

> ... After some further discussion, the Board agreed that it should be guided by the views of the Ministry and the following motion was dictated by the Chairman for consideration of the Board:-

The Board agrees that the ruling of the Ministry of Trade and Industry in relation to condition 'c' of the Manufacturing Licence should determine whether or not DMIB as presently constituted could acquire the shares offered. If the condition of the licence will be breached by the DMIB acquisition of the shares, the Board agrees that the DMIB acceptance may be considered to be null and void. Under these circumstances the acceptance of PSDH will be operative.

Encik Halim Dahlan declared that such a delay in coming to a decision was unnecessary as it was very clear that DMIB acquisition of further shares would certainly breach condition 'c' of the licence. He wanted the Board to come to a decision on the matter immediately. The Chairman suggested that the proposal he had put forward was the only responsible way the Board could proceed and did not consider the time involved as representing "inordinate delay". The Board agreed to the motion put forward by the Chairman.

At this junction the Secretary raised the question of how a Board resolution can legally nullify offers accepted under the terms of a joint venture agreement. Encik Shamsuddin bin Mahyuddin suggested that the simpliest course would be for DMIB to withdraw their acceptance and remove any formal legal complications. The Chairman pointed out that any decision taken by the Board is governed by all the agreements entered into and certainly conditions in the manufacturing licence cannot be breached by a responsible Board.

Mr. Moffett suggested that the Chairman while seeking clarification from the Ministry should also try and determine the Ministry's view on the influence of PEGI's intended purchase of 51% of DMIB. Mr. Moffett agreed that as yet no time frame can be given for the finalisation of this transaction. Nevertheless he felt that this intended change should be presented to the Ministry for a realistic ruling. The Board noted that it had no additional information than those presented in newspapers and such information was already known to the Ministry.

These minutes were tabled at the 20th Board meeting held on 12 January 1983. The relevant portion of the minutes of the meeting of 12 January 1983 is as follows:

The Minutes of the Nineteenth Board Meeting held on 23 December 1982 were tabled before the meeting and time was allowed for reading thereof. Thereafter, the minutes were taken as read and adopted as a correct record of the proceedings. However Mr. MJH Moffett protested and declared that his understanding was that the motion dictated by the Chairman was not submitted for voting.

By its letter of 4 January 1983 the Ministry gave its views on the rulings sought. A translation of the letter is as follows:

TRANSLATION

YB Tan Sri Dr. B.C. Sekhar
Chairman
IT International Sdn. Bhd.
c/o Malaysia Rubber Research &
Development Board
P.O. Box 508
KUALA LUMPUR.

Dear Sir,

Industrial Co-ordination Act
- Manufacturing Licence

I have been instructed to refer to your letter dated 24 December 1982 which requested the Ministry for its views on the following:

(a) Whether it is possible for DMIB at this point of time to acquire those shares in IT International offered by the other shareholders without infringing condition (c) of the Manufacturing Licence of the Company; and

(b) Whether it is possible for PSDH to acquire all the shares offered without infringing the Manufacturing Licence.

2. The Ministry wishes to draw your attention to the fact that among the conditions imposed on IT International was that 79% of the shares shall be held by Malaysians and at least 65% of which shall be held by Bumiputras. This means that any increase in the foreign shareholding of IT International without a proportionate increase in the holdings by Malaysians and Bumiputras would infringe condition (c) of the Manufacturing Licence. Therefore, any increase in the holding by DMIB, the majority of whose shares are held by foreigners, would infringe condition (c) of the Manufacturing Licence.

3. Regarding your second question, the Ministry wishes to draw your attention to the fact that PSDH, unlike DMIB, is a Company the majority of whose shares are held by Malaysians of which Bumiputras constitute the majority. Based on the foregoing, the Ministry is prepared to consider any application by PSDH to acquire all the shares held by MARDEC, Police Co-op and LTAT. The consequent reduction of the Malaysian and Bumiputra contents in the shares ownership of IT International arising from the acquisition of PSDH is still within accepted levels.

Thank you,

Yours obediently,

(Burkhan Abdullah)
Industrial Division
b/p Secretary-General
Ministry of Commerce & Industry

Tan Sri Dr. Sekhar telephoned Mr. Moffett and told him that the Ministry would not approve of DMIB taking up the shares. Tan Sri Dr. Sekhar wanted to call for a Board meeting to be held immediately but was prevailed upon by Mr. Moffett to have it a few days later on the 12 January 1983.

The only item in the agenda of the meeting was:

> To consider the reply received from the Ministry of Trade and Industry relating to condition (c) of the manufacturing licence and consequent changes in share ownership.

At the meeting the said reply from the Ministry was tabled and it was disclosed that purportedly in the light of the reply from the Ministry the three outgoing shareholders had proceeded to complete the sale of their shares to PSDH. The representative of PSDH produced the relevant memoranda of transfer and asked the Board to approve the transfers which the Board did in spite of protests by Mr. Moffett on behalf of DMIB.

On 14 January 1983 the writ was caused to be issued in which the plaintiffs, DMIB, claim *inter alia*,

(1) a declaration that the outgoing shareholders are bound by the agreements for sale of their shares to DMIB.

(2) a declaration that the transfers of their shares to PSDH are null and void and of no effect on the grounds.

(a) the existence of the agreements with DMIB

and/or (b) non-adherence of the requirement of s. 179 Companies Act

and/or (c) the terms of the JVA

and/or (d) the terms of the Articles of ITISB

and/or (e) the conditions of the manufacturing licence,

(3) an injunction and damages,

(4) other consequential orders.

On an *ex parte* application an interim injunction was obtained on 14 January 1983 restraining the registration of the transfers by the outgoing shareholders to PSDH.

Earlier, on 12 January 1983 PSDH had applied to the Ministry for approval of the transfers to them of the shares of the outgoing shareholders which was given to them by the Ministry's letter of 19 January 1983.

DMIB too had made an application, through their Merchant Bankers, to the Foreign Investment Committee (FIC) on 27 December 1982. FIC replied by their letter of 25 January 1983 requiring the plaintiffs to seek the approval of the Ministry. This the plaintiffs never did.

After the judgment of the Court on the reconsideration of the order for interim injunction was delivered on 12 March 1983 there was an exchange of further correspondence between the solicitors for the outgoing shareholders and the solicitors for DMIB i.e. the correspondence exhibited as Bundle "C". DMIB were required even at that stage to obtain the approval of the Ministry, the vendors claiming that they would be prepared to complete if such approval was obtained. DMIB took the attitude that the matters were *sub-judice*. They did not seek the approval of the Ministry or anybody else.

Per se, the fact that the proposed change in the equity structure of ITISB would be in breach of condition (c) of the manufacturing licence does not make the said conditional agreements between DMIB and the outgoing shareholders void. For instance if the company had decided to cease the manufacture of tyres and accordingly did not need to have the manufacturing licence, its terms could be ignored. There is nothing in the licence or in its terms and conditions (or in the Industrial Co-ordination Act for that matter) that effectively prevents one or more shareholders from divesting itself of any of their shares.

What could happen was that once the equity structure was changed and was inconsistent with condition (c) the further manufacture of tyres would have been in contravention of the condition (c) of the licence and as such illegal.

Clause 9.1 of the JVA provides for the parties ensuring that "the terms conditions and stipulations of this Agreement are fully complied with and effectively implemented in all respects. No party shall voluntarily do or suffer to be done any act or thing whatsoever whereby the compliance or implementation of this Agreement is prevented or frustrated or rendered ineffective in any manner whatsoever."

It has already been seen that the primary object of the JVA was the establishment of a joint venture industry for the manufacture of various types of tyres in Malaysia in implementation of which ITISB was established. If follows that any act by a party to the JVA that would frustrate that primary object of the JVA would be in breach of Clause 9.1.

That the outgoing shareholders were aware of condition (c) and of Clause 9.1 is reflected in the condition they and each of them imposed in the offers made for the sale of the shares - that the sale was subject to the approval of the Malaysian Authorities. I find no other reason for imposing that condition. And as it was the Ministry of Trade & Industry who had issued the manufacturing licence and had imposed condition (c) it follows that the Malaysian Authorities referred to in the offer letters must be the Ministry.

If there was any doubt as to who was the relevant Malaysian Authority, that I think can be said to have been resolved when DMIB sought the approval of the FIC to complete the sale and were informed that the application should be made to the Ministry of Trade and Industry.

DMIB never applied to the Ministry. The evidence is that the refusal to apply to the Ministry was deliberate. In my view the reasons for this were obvious. Whatever may be the interpretation of the words "Malaysian citizen" in condition (c), it was, at all relevant times, obvious to all parties including DMIB that the Ministry would not approve any application by DMIB so long as it was substantially foreign-owned to take up the shares of the outgoing shareholders. The foreign quota allowed by the Ministry had been over-subscribed by DMIB owning 30.71% of ITISB.

Tan Sri Dr. Sekhar took it upon himself to seek the views of the Ministry by the letter of 15 December 1982. His doing so has been criticised by Counsel for the plaintiffs in the course of his submission. It was argued that since the directors of the company should act as a Board the Chairman was not entitled to write to the Ministry on behalf of ITISB without reference to the other directors. The letter which is Exhibit A128 did not commit the company or anybody to anything. It only sought the views of the Ministry by way of clarification of the import of condition (c). The criticism of Tan Sri Dr. Sekhar is in my view misconceived and without any merit. To my mind with the surfacing of the problem posed by DMIB wanting to take up more shares, Tan Sri Dr. Sekhar was perfectly justified in trying to find out what the effect of DMIB's stand would be on the company of which he was Chairman. If anything, in my view, he could have been faulted if he had not done so.

It was after that letter was written and before a reply to it was received that the meeting of 23 December 1982 took place which resulted in Tan Sri Dr. Sekhar writing the letter of 24 December 1982 to the Ministry the reply to which was tabled at the meeting of the Board of 12 January 1983.

A point about which much had been made of is that the motion that Tan Sri Dr. Sekhar had dictated was not voted upon. For the plaintiffs it was contended that what had happened was that the motion was to be held in abeyance or that Mr. Moffett who represented the plaintiffs was under the impression that it was to be left in abeyance.

To my mind in the context in which Tan Sri Dr. Sekhar dictated the motion, a vote on it was not called for. It is to be noted that it was after the Board had "agreed that it should be guided by the views of the Ministry" that the Chairman dictated the motion. The motion was discussed and the discussion ended with Mr. Moffett suggesting "that the Chairman while seeking clarification from the Ministry should also try to determine the Ministry's view ..." on the PEGI factor.

The minutes of the meeting disclosed and I find as a fact that Mr. Moffett was party to what had been agreed and further confirmation of this is seen in that as an after-thought Mr. Moffett had suggested that in seeking clarification of the Ministry as to whether condition (c) would be breached by the acquisition of the shares by DMIB the Chairman should bring

to the attention of the Ministry the PEGI factor. Other evidence shows that the Chairman did just that within the terms of what the meeting of 23 December 1983 had decided should be done.

It must not be forgotten that by the terms of the JVA each member of the Board of Directors was representing a shareholder and that ITISB was in reality a partnership of corporations carried on in the guise of a company. In effect in all the circumstances the partners to the JVA had been committed by their representatives to seek and be bound by the ruling of the Ministry.

In my judgment as a result of what transpired at the meeting of 23 December 1982 DMIB are bound by the ruling of 4 January 1983 given by the Ministry. What had been agreed was that if the Minister ruled that condition (c) would be breached by DMIB exercising its right of pre-emption then the acceptance by DMIB of the offer of shares by the outgoing shareholders was to be considered null and void and "the acceptance of PSDH will be operative". The ruling of the Ministry was that any increase in the holding by DMIB in ITISB would infringe condition (c). In giving that ruling the Ministry explained that it understood the position to be that the majority of the shares of DMIB was held by foreigners. There had been a tacit admission that this was the position when Mr. Moffett sought to have the attention of the Ministry drawn to the PEGI factor. Apparently all those concerned including the Ministry understood the reference to and the import of the PEGI factor. DMIB had been negotiating with a group of companies known as PEGI to the end that equity holdings in DMIB would be restructured in such a way that the majority holdings of DMIB would be classified as Bumiputra as opposed to foreign. At best, at all relevant times negotiations between DMIB and/or its shareholders and PEGI were pending. Encik Burkhan Abdullah of the Ministry of Trade & Industry testified that the Ministry understood that DMIB was substantially foreign-owned on the basis of information supplied to the Ministry by DMIB itself. There has not been any evidence to the contrary. In the circumstances it seems to me that it was obvious that the only hope DMIB had of acquiring the shares or a proportion of the shares offered by the outgoing shareholders without infringing condition (c) was to have the transaction delayed until the restructure of DMIB. DMIB wanted time. But the offers had been made and the pre-emptive procedures had been set in motion.

The ruling of the Ministry had to relate back to what had been agreed to at the meeting of 23 December 1982. It follows then that by the agreement of the parties arrived at - at that meeting of 23 December 1982 the acceptance of DMIB of the shares was to be considered as null and void.

In any event even if the agreement arrived at by the members of the Board of ITISB cannot be said to be binding on the corporations and co-operatives that those members represented the ruling of the Ministry certainly made it clear that DMIB could not meet the condition imposed in the offers that the sale was subject to the approval of the Malaysian authorities.

The plaintiffs are not entitled to the declaration sought in the first prayer in the statement of claim.

Before I move on to the next point I should deal with what may be best described as complaints made by Encik Humfrey Ball in the course of his submissions on behalf of the plaintiffs. I refer to the suggestion that there was some sort of conspiracy between PSDH and the outgoing shareholders and Tan Sri Dr. Sekhar and even officials of the Ministry. He has used words like "secrecy" and "lobbying", "surreptitious" and "keeping DMIB in the

dark". I have no doubt that there must have been secret meetings and private telephone conversations. There must have been some lobbying and I dare say even some horse trading. I am not aware of any law or any rule of practice, custom or tradition generally and vis-a-vis this case of any terms of any agreement or understanding between the parties or any of them that prevents some of the parties to the common venture out-manoeuvring others so long as the manoeuvres are within the law and not inconsistent with the terms of the understanding between the parties. The right to negotiate the sale and to sell and transfer shares are not curtailed provided the pre-emption procedures are adhered to. There has not been any evidence before me of any improper activity on the part of any outgoing shareholders or Tan Sri Dr. Sekhar or Ministry officials. Manoeuvres there were on the part of the outgoing shareholders, PSDH and even DMIB and these were only to be expected and I have not found any evidence that they were anything but within the bounds of propriety.

It has been suggested that the writ was caused to issue as a manoeuvre by DMIB in a desperate attempt to gain time so that the negotiations with PEGI (which in itself is an interesting manoeuvre by DMIB) could be concluded that could result in the restructuring of DMIB so that it would be substantially Bumiputra-owned, thereby qualifying DMIB to take up more shares in ITISB.

If that was the reason or one of the reasons for DMIB causing the writ to issue, for that manoeuvre to be successful DMIB had to satisfactorily conclude the negotiations with PEGI in the short time available. As has been seen, once the pre-emptive procedures were set in motion time limits were imposed by the JVA. The last day available to PSDH to complete the purchases in the event by the pre-emption rights the shares were not taken up was, as has been seen, 23, 28 January and 12 February 1983 respectively, which meant that even assuming that DMIB had up to the last day available to PSDH, to complete the sale, DMIB should have been in a position to and should have completed the sale at the latest on those dates unless the taking out of the writ on 14 January 1983 had the effect of freezing the march of time prescribed by the Clause 1.5 of the JVA. In *Johnson v. Agnew* [1980] AC 367 in stating what he held were uncontroversial propositions of law, Lord Wilberforce said (at 393) that even if an order for specific performance is sought and made, the contract remains in effect and is not merged in the judgment for specific performance. If follows that it must be even more so if the situation obtaining is that all that has happened is that a writ had been caused to issue. That does not get rid of the contract. It is still there and whatever may be the dispute between the parties and whichever way those disputes may eventually be resolved the requirements of the terms and conditions of the contract continue to obtain and have to be met. In *K.T. Chandy v. Mansa Ram Zade* [1974] AIR SC 642, where pending the disposal of a civil suit filed by an employee challenging the employer's notice to terminate the contract of service and where no interim injunction was asked for, the employer defendant issued a second notice also terminating the employee's services. A Bench of the Calcutta High Court had held that the issue of the second notice was in contempt of the Court where the proceedings were pending. But the Supreme Court held otherwise. It said at p. 644 of the report:

> ... It is true that the law of contempt of Court is essential for keeping the administration of justice pure and undefiled. It is also well to remember that our society is also interested in the fulfilment of a man's expectations under a contract. To that end we have a law of contract in our country. Assigning an unlimited and undefined area to either of them would unduly curtail the area of the other. Each should have a viable area so that justice may hold high her head and contract is not cribbed and cramped. But what is the yardstick to measure their area of operation?

The judgment then referred with approbation to some cases where the *bona fide* exercise of statutory rights while certain litigation was pending was held not to be contempt. The judgment went on to read:

> ... These cases establish that *bona fide* exercise of a statutory right by a party to a proceeding is not contempt in the absence of an interim injunction against or undertaking by that party. There appears to be no sound reason why this principle should not extend to the exercise of rights under a contract. The rights of a party under a contract are his legal rights. In our view, *bona fide* or honest exercise of a right under a contract should be the yardstick for allocating their respective area to contempt and the contract. It gives to each its proper sphere. So where a party to a suit as here, terminates the service of the adversary party in the honest exercise of his rights under the contract of service and in the absence of any interim injunction or undertaking, his act would not constitute contempt of Court. We are satisfied from a combined reading of the two notices relating to termination of service that the appellant had terminated the service of the respondent in the honest exercise of the right vested in the Company by the contract of service. So he has not committed contempt of the Munsif's Court.
>
> The order terminating his service does not threaten the respondent to withdraw the whole or part of his suit. The mere circumstance that one or more of the reliefs claimed in the plaint have become infructuous on account of the termination order would not establish contumacy. The respondent is free to amend his plaint and ask for a relief against the termination order.

In the instant case the only interim injunction obtained was by the plaintiffs and was to restrain the registration of the transfers effected by the outgoing shareholders in favour of PSDH. In my judgment the plaintiffs had no excuse not to proceed to complete or offer to complete the exercise of their pre-emptive rights *vis-a-vis* the acceptances by them of the offers made by the outgoing shareholders. This involved as has been seen obtaining the approval of the "Malaysian Authorities" which I have found to be clear or ought to have been clear in the minds of all concerned to be the Ministry of Trade and Industry and it also included tendering the purchase price for the shares both of which were not done and in the absence of an injunction restraining the plaintiffs and/or the outgoing shareholders from completing the sale and in the absence of some sort of binding undertaking to maintain the *status quo*, the outgoing shareholders were by effluxion of time discharged from their obligation to sell the shares to the plaintiffs if not earlier, certainly on those dates 23, 28 January 1983 and 12 February 1983 respectively.

The outgoing shareholders made the position even more untenable for the plaintiffs by extending the time for completion to 30 April 1983 (I do not go into the question of whether the JVA allowed them to do so) by their solicitors' letter of 15 April 1983 (Exhibit C5). It seems to me that even if I am wrong in my view that by the terms of the JVA, the 23, 28 January and 12 February 1983 were the last dates respectively available, by virtue of the said letter Exhibit C5 unless the plaintiffs could show that they had prior to 30 April 1983 applied to the Ministry for the approvals (that was all that the outgoing shareholders were asking for by the letter C5), the outgoing shareholders were discharged from their obligations under the conditional contracts with the plaintiffs. And accordingly again the plaintiffs are not entitled to the declaration sought by their first prayer.

I move on to the second prayer, for the declaration that the transfers of the shares by the outgoing shareholders to PSDH are null and void, and deal with it in the sequence of the grounds relied on in the prayer.

(a) On the ground of the existence of the agreements with DMIB

This has been dealt with. I have held that the ruling of the Ministry by its letter of 4 January 1983 (which by agreement of the parties are binding on them) made the acceptances by DMIB of the offers by the outgoing shareholders null and void. The effect of the ruling is that the agreements with DMIB ceased to be of effect and "the acceptances of PSDH will be operative".

Alternatively I have held that by reason of DMIB not completing the purchases within the time limits imposed by the terms of the JVA (and Articles) and even when the period for simply applying to the Ministry was extended and no such application was made, the outgoing shareholders were discharged from their liabilities under the conditional agreements with DMIB.

Accordingly this ground has no merit.

(b) Section 179 Companies Act

The contention is that in reality the arrangements for PSDH to take up the shares of the outgoing shareholders came about as a result of offers made by PSDH. Encik Humfrey Ball invites me to come to such a conclusion on the basis of the conduct of the various parties, particulars of which as set out from p. 17 to p. 34 of his written submission. I have given due consideration to what is stated in the submissions of Encik Ball. I have also considered the relevant evidence including the testimony of Encik Halim Dahlan who testified as to how the offers made by the outgoing shareholders came to be made. In my judgment overwhelmingly the probabilities are in favour of concluding as I do that with the business of ITISB falling short of the earlier projections there was disappointment and even disillusionment which resulted in KPDM making the move to pull out followed by the others including eventually even PKNK. It is not surprising that approaches were made to PSDH having in mind that it was they who had picked up, with the consent of DMIB, the whole of the rights issue refused by the outgoing shareholders and PKNK. The offer letters were by each of the outgoing shareholders and not by PSDH and there is nothing in the evidence to suggest that in reality it was PSDH who had made the offers. On the facts s. 179 has no application.

As to the grounds (c), (d) and (e) of the second prayer the relevant terms and conditions have been considered hereinbefore and an application of the facts to those terms and conditions leads to the conclusion I have already arrived at, that the outgoing shareholders ceased to be bound by the conditional agreements they had entered into with DMIB for the sale of their shares in ITISB.

The plaintiffs' claim and each of them are dismissed with costs.

Also found at [1984] 2 CLJ 103